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Supreme Court of The United States

October Term, 1943.

No. ~~820~~ 45

BESTER WILLIAM STEELE,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO.
a corporation;
BROTHERHOOD OF LOCOMOTIVE
FIREMEN & ENGINEMEN,
W. H. THOMAS, J. P. ADAMS and B. F. McGILL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 826

BESTER WILLIAM STEELE,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., a corporation;
BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
W. H. THOMAS, J. P. ADAMS and B. F. McGILL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment or decree of the Supreme Court of Alabama, which petitioner seeks to have reviewed, was rendered by the Supreme Court of the State of Alabama January 13, 1944 (R. 131), affirming a decree

of the Circuit Court of Jefferson County, Alabama, in Equity, in the cause of Bester William Steele, Complainant, v. Louisville & Nashville Railroad Company, a corporation, Brotherhood of Locomotive Firemen & Enginemen, W. H. Thomas, J. P. Adams and B. F. McGill, Respondents, sustaining demurrers of the respondents to petitioner's bill of complaint and dismissing said bill of complaint. The opinion and decree of the Circuit Court of Jefferson County in Equity is shown in the record (R. 124, 125, 126). The opinion of the Supreme Court of Alabama is shown in the record (R. 131 to 144) and is reported in 16 So. (2d) 416.

JURISDICTION

Petitioner states that the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347). Since jurisdiction under such section is confined to a review of judgments or decrees rendered by Circuit Courts of Appeal or the Court of Appeals of the District of Columbia, it is assumed that petitioner's reference was inadvertently made, and that the petition was intended to be filed pursuant to the provisions of Section 237 of the Judicial Code as amended by Act of February 13, 1925, 43 Statutes 939 (Sec. 344, Title 28 U. S. C.).

STATUTE INVOLVED.

Petitioner states that the statute involved is the

Railway Labor Act (Act of May 20, 1926, as amended by the Act of June 20, 1934 (45, U. S. C. Section 151-164).

STATEMENT OF THE CASE

The petitioner, as complainant, filed his bill of complaint (R. 84) in the Circuit Court of Jefferson County, Alabama, in Equity, against the Railroad, the Brotherhood and certain individual representatives or members of the Brotherhood. In this bill petitioner alleged that he was a Negro fireman employed by the Railroad and that he sued on behalf of himself and as representative of all other Negro firemen and helpers employed by said Railroad.

The bill alleged that petitioner was fifty-five years of age, in good health and had been employed as a locomotive fireman for the Railroad since February 4, 1910, and had acquired certain seniority rights under a collective bargaining agreement between the Railroad and its Locomotive Firemen and Hostlers, dated March 1, 1929 (R. 85-86); that white firemen constituted a majority of the craft or class on the Railroad as a whole, although on certain divisions the Negro firemen constituted a majority (R. 86); that since the passage of the Railway Labor Act the Brotherhood, which only admits white men to membership therein, has acted as the bargaining agent or representative of the entire craft or class; that the Negro firemen have never been given an opportunity to participate in the choosing of such representative, but by reason of their minority position they were compelled to, and did accept the Brotherhood as such representa-

tive under the Railway Labor Act (R. 87); that the Brotherhood thus assumed a confidential relation with each fireman and undertook the performance of a fiduciary duty to represent them impartially in good faith; that it therefore became the duty of such representative to give each fireman reasonable notice of any action proposed by such representative which might be adverse to his interest, with an opportunity to be heard and a chance to vote thereon; to make full disclosure of actions, not to discriminate between members of the class, and generally to conform to the rules of law governing the relations existing between principal and agent (R. 87, 88).

After averring a general purpose and course of conduct alleged to be hostile and disloyal to petitioner and the minority group represented by him, in violation of the alleged duties of the Brotherhod as such representative, it is alleged that on March 28, 1940, in fraud of the petitioner and other Negro firemen, without notice, hearing or vote, the Brotherhood, as such representative under the Railway Labor Act, served on the Railroad a notice or request for certain changes in the existing collective bargaining agreement of March 1, 1929, and asked for a conference for the consideration of such proposed changes. (R. 88,—for copy of notice of March 28, 1940, see R. 59 and 60).

After negotiations pursuant to the notice dated March 28, 1940, it is alleged that the Brotherhood, as such representative under the Railway Labor Act, negotiated an amendatory agreement dated February 18, 1941 (R. 10, 11, 12 and 13), and on May 12, 1941, ex-

ecuted a supplemental agreement pursuant to the terms of the agreement of February 18, 1941 (R. 13 to 21).

The amendatory agreement of February 18, 1941 (effective February 22, 1941) contained, among other things, the following provisions:

"(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

"(2) The above percentage shall be reached as follows:

"(a) Until such percentage is reached on any seniority district only promotable men will be hired.

"(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

"(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

"(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present

rules and practices to the position of locomotive engineers.

"(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

The supplemental agreement of May 12, 1941 (effective March 15, 1941) provided specifically for the application to the L. & N. Railroad of the general agreement of February 22, 1941; and comprises a detailed explanation of the operation of such general agreement.

It is alleged in the bill that such changes or modifications adversely affected the seniority rights formerly enjoyed by the petitioner and other Negro firemen.

The bill challenges the validity of the Railway Labor Act as being repugnant to the Due Process Clause of the 5th Amendment to the Constitution of the United States (Sec. 27 of the Bill, R. 95-96).

The bill sought relief as follows:

(a) To enjoin the enforcement of an alleged amendment or modification of the basic agreement negotiated between the railroad and the Brotherhood for the benefit of the firemen as a craft or class under the Railway Labor Act (Chapter 8, Title 48, U. S. C. A.) (R. 96);

(b) For discovery from the railroad and Brotherhood of certain detailed information with re-

spect to the earnings of firemen alleged to have received benefits under the amendment or modification of such agreement; and information with respect to the negotiations by which the alleged amendment or modification was effected (R. 96);

(c) For an injunction against the Brotherhood, its officers and agents and against the individual respondents, enjoining them from acting under the Railway Labor Act as representatives for petitioner or others similarly situated, so long as such respondents refuse to give petitioner, or such others, notice and an opportunity to be heard and an opportunity to vote on proposals adversely affecting their interests, and so long as respondents discriminate against petitioner or those similarly situated (R. 96-97);

(d) For a declaratory judgment declaring the respective rights, status and other legal relations of the parties in, to and by reason of the matters in controversy (R. 97);

(e) For $50,000.00 damages claimed by petitioner against the Brotherhood for alleged injuries sustained by him as a consequence of the alleged wrongful acts of the Brotherhood in negotiating such amendment or modification to such employment agreement (R. 97);

(f) For damages against the Brotherhood for alleged injuries sustained by other firemen similarly situated, who may appear, submit to the jurisdiction of the Court and establish their claims for damages (R. 97).

Demurrers of the respondents to the bill as last amended (referred to as "substituted amended complaint") were sustained, and the bill was dismissed by

a decree of the Circuit Court of Jefferson County, Alabama, in Equity, on the ground that the bill was without equity (R. 124, 125, 126), which decree was affirmed by the Supreme Court of Alabama (R. 131 to 144).

SUMMARY OF ARGUMENT

1. No substantial Federal question is involved. The Due Process Clause of the 5th Amendment is not applicable to action of individuals.

2. It is not shown that any involuntary servitude is imposed upon petitioner in violation of the 13th Amendment. Alleged "economic servitude" is not the equivalent of "slavery" or "involuntary servitude".

3. Congress, in the enactment of the Railway Labor Act, did not undertake governmental regulation of wages, hours or working conditions.

4. The provisions under the Railway Labor Act for collective bargaining, and for the settlement of labor disputes by mediation conciliation and arbitration do not contravene the Due Process Clause of the 5th Amendment. Its beneficient provisions are nevertheless voluntary as to the employes. Their right to strike is not destroyed. Management is still in the hands of the Railroads.

5. Petitioner is not shown to have exhausted his remedies under the Railway Labor Act for the settlement of his grievance through mediation, conciliation or arbitration, which remedies were designed to exclude interference by judicial process, with exceptions

specifically provided by Congress but not here applicable.

6. The alleged cause of action does not arise under Federal law. The Court properly held that a Court of Equity would not enforce specific performance of the alleged employment contract or seniority rights thereunder. Recovery was sought under State law, and as no equitable ground of jurisdiction was found to exist—his claim for damages involving only an action for which there was an adequate remedy at law—the bill in equity was properly dismissed.

ARGUMENT.

I

The attack upon the validity of the Railway Labor Act on the ground that it is in violation of the Due Process Clause of the 5th Amendment to the United States Constitution presents no substantial Federal question.

The Railway Labor Act has, in numerous cases, been decided by this Court to be a valid enactment under the Commerce Clause of the Constitution. Since the constitutionality of this Act has been so thoroughly settled by this Court, the attempt of petitioner to have the decision of the State Court in this case reviewed upon the alleged ground that the Act violates the Due Process Clause of the 5th Amendment is entirely without merit. The validity of the Railway Labor Act has been established in the following decisions of this Court:

Switchmen's Union of North America, etc. v. National Mediation Board, et al, 64 S. Ct. 95.

General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri, Kansas, Texas Railroad Company, et al, 64 S. Ct. 146.

General Committee of Adjustment of Brotherhood of Locomotive Engineers, et als vs. Southern Pacific Company, et als, 64 S. Ct. 142.

Brotherhood of Railway and Steamship Clerks, et al vs. United Transport Service Employees of America, 88 L. Ed. 153, 64 S. Ct. 260.

Virginia Railway Co. v. System Federation, 300 U. S. 515.

Terminal Railroad Association v. Brotherhood of R. Trainmen, 318 U. S. 1, 6; 87 L. Ed. 571.

See, also:

Washington Terminal Co. v. Boswell, 124 Fed. (2d) 235.

The reasons assigned in the bill in support of the contention that the Railway Labor Act is in conflict with the Due Process Clause of the 5th Amendment are specified as follows:—

(a) So far as it attempts "to confer on the majority of a craft or class of railway employees the power to choose the representative for the entire craft or class"; and

(b) So far as it attempts "to confer on said representative unbridled and absolute power to destroy minority property rights in favor of the majority". (R. 95-96).

The first specification challenges the validity of the Act in setting up machinery under which any craft or class of employees may, by a majority vote, choose a representative for the purpose of collective bargaining. This challenge is answered with finality in the cases hereinabove cited in which this Court has upheld the validity of this legislation in providing a means for the settlement of labor disputes in this field by mediation, conciliation and arbitration, supplemented by certain legal sanctions in the enforcement of the declared policy of the Act. Although the right to strike was not taken away, the right or principle of collective bargaining was made enforceable by judicial process. Petitioner's attack upon the principle of collective bargaining or upon the provisions for collective bargaining, by majority action of each separate craft or class, as contained in the Railway Labor Act, does not present a substantial Federal question. The Federal questions are too well settled. Nor is this Court given jurisdiction to review the decision of the State Court by the bare averment of a Federal question. In such case the mere allegation of the Federal question is treated as fictitious or frivolous.

Gully v. First National Bank, 299 U. S. 109.

Hoffman v. Hanan (N. Y. 1937) 57 S. Ct. 350; 300 U. S. 14; 81 L. Ed. 476.

Seaboard Air Line Ry Co. v. Watson (1932) 53 S. Ct. 32; 287 U. S. 86; 77 L. Ed. 180.

Mullinger v. Hartupee (Pa. 1868) 73 U. S. (6 Wall.) 258, 18 L. Ed. 829.

Twitchell v. Pennsylvania (Pa. 1869) 7 Wall. 321; 19 L. Ed. 223.

St. Louis, C. B. & Ft. S. Ry. Co. v. Missouri (Mo. 1895) 156 U. S. 478, 15 S. Ct. 443, 39 L. Ed. 502.

Hamblin v. Western Land Co. (Iowa 1893) 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267.

The second specification in the bill, that the Railway Labor Act fails to provide due process in so far as it attempts to confer upon the bargaining representative so chosen under the Act "unbridled and absolute power to destroy minority property rights in favor of the majority" is patently frivolous. Such contention is couched in unwarranted conclusions of the pleader and likewise presents no substantial Federal question.

The representative is not chosen by Congress; and the Act is not in any sense a grant of governmental power or authority to the representative. It only recognizes a fundamental right for which organized labor, and in fact all groups of employees have struggled throughout the years. Furthermore, even the violation by an official of a duty imposed upon him by statute does not demonstrate the invalidity of the law, but to the contrary merely invalidates the act of the individual. Assuming for the sake of argument, that the bargaining representative violated a duty imposed upon it by law (which we by no means concede to be the case here involved), such abuse of power would not invalidate the Act. But that is not the case here for the reason, first, the representative is not chosen or appointed by Congress, but by the employees—by a ma-

jority of the craft or class to which petitioner belongs; and, second, the alleged breach of duty by the representative is alleged as a mere conclusion of the pleader, for it is not shown that the Railroad would have accepted a different proposal, or that the majority were willing any longer to continue in force the former agreement without precipitating a labor dispute between the promotable firemen and the Railroad or between the promotable firemen and the non-promotable firemen.

If petitioner's complaint is with respect to the choice of the representative, or as to the craft or class designated for such purposes, we find that Congress has provided in Section 2, Ninth, for the determination of such disputes by the National Mediation Board in the exercise of an adjudicatory function, enforceable by judicial sanctions.

Missouri, K. T. R. Co. case, supra.

Virginia R. Co. case, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

A complete answer to the contentions of petitioner that the Railway Labor Act violates the Due Process Clause of the 5th Amendment is contained in the opinion rendered by Mr. Justice Jackson in the case of *Terminal Railroad Association v. Brotherhood of R. Trainmen*, 318 U. S. 1, 6; 87 L. Ed. 571, wherein he said:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working

conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

In the "Questions Presented" by petitioner in his petition (page 8) an effort is made to change somewhat the ground of attack on the constitutionality of the Railway Labor Act. In question number 2 (p. 8 of the petition) the question is posed as to whether or not the "grant of power by Congress" to the representative who may be chosen under the Act, is subject to the restraints of the 5th Amendment.

That question is answered in the case of *Terminal R. R. Association v. Brotherhood of R. Trainmen, supra*, where it is emphatically stated that the Act "does not authorize anyone to fix" working conditions; and it is in no sense a grant of governmental power or official authority.

Prior to the adoption of the Railway Labor Act the petitioner's wages, hours and working conditions were left to negotiation by individual contracts of employment, with an unprotected right to bargain collectively, or were left to enforcement by strikes. Under

the Railway Labor Act he has the benefit of the principle of collective bargaining, with added sanctions; and pursuant to this Act he acquired certain seniority rights, under the agreement of March 1, 1929; and enjoys the seniority rights accorded him under the agreements of February 22, 1941, and May 12, 1941. As expressed in *Washington Terminal Company v. Boswell, supra*, the Railway Labor Act was designed "not to outlaw the right to strike but merely to prevent the necessity for its exercise".

The petitioner was not orginally employed, nor is he now employed, pursuant to the mandate of any statute. His employment contract is a private contract, and it is not shown that any constitutional rights, privileges or immunities of petitioner are infringed by the terms or provisions of the Act.

Neither the adoption of the principles nor the machinery for the applying of such principles of mediation, conciliation and arbitration of labor disputes as contained in the Railway Labor Act constitutes a denial of due process. Its provisions have been construed as entirely voluntary. (See *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. Rep. 754.)

Prior to the Railway Labor Act there was no judicial process for the settlement of wages, hours or working conditions of the employees, therefore no due process is denied by the Act. Surely no one in this day may successfully attack the principle of collective bargaining as involving a denial of due process of law.

The substance of petitioner's attack goes to the point that he is dissatisfied with the representative

chosen by a majority of the craft or class involved, or is dissatisfied with the manner in which the representative is discharging the duties imposed upon it; or is dissatisfied with the manner in which the representative of such craft or class is chosen. Although petitioner does not directly challenge the validity of the method pursued of placing all firemen employed on the Railroad within one class or craft for the choosing of a bargaining representative, he inferentially seeks to have the Negro firemen placed in a separate class or craft or to have the firemen employed on the several divisions of the Railroad placed in separate classes or crafts, and thus obtain separate bargaining representatives for the Negro firemen under the Railway Labor Act. But this Court has decided that these are questions delegated by Congress for determination by the National Mediation Board and not by the Court.

If the petitioner was entitled to such relief, it is not shown that he has exhausted the remedies provided by the Railway Labor Act. He goes no further than to allege that he protested to the Railroad and Brotherhood and appealed such protests to certain officers of the Railroad and Brotherhood. (R. 93-94).

The Act expressly provides "for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; and "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions". (Title 45 U. S. C., Sec. 151 (a)). The general duty of settling labor disputes is imposed upon both carriers and employees (Title 45, U. S. C., Sec.

152, First). The First Division of the National Railroad Adjustment Board is expressly given jurisdiction over disputes involving firemen. (Title 45 U. S. C. Sec. 153, First, (h), (i)). Under this section provision is made for a hearing in person or by counsel (j). Such award, when made, is final and binding upon the parties to the dispute (m). If the carrier does not comply such compliance may be enforced by an action in the District Court of the United States (p).

The Act contains further provisions for the settlement of labor disputes by mediation before the National Mediation Board (Sec. 155). If not settled by conference, or by the Adjustment Board or through mediation, provision is made for arbitration under Sections 157, 158 and 159. But petitioner is not shown to have exhausted such redemies under the Railway Labor Act.

II

The negotiation of the amendatory agreement of February 18, 1941, and supplemental agreement of May 12, 1941, did not constitute denial of due process of law under the 5th Amendment, nor impose involuntary servitude in violation of the 13th Amendment.

Since the constitutionality of the Railway Labor Act has been thoroughly established, it follows that agreements made pursuant thereto are valid. If a dispute arises with respect to the designation of a class or craft, the choosing of a representative therefor, or with respect to any agreement negotiated by such representative, or the construction or operation thereof, such dispute may be settled by voluntary action through medi-

ation, conciliation or arbitration, or the employee or group involved may resort to economic pressure or strike—the same powers he had before the adoption of the Act.

The mere abuse of powers or duties imposed upon any official representative or board or body is insufficient to show invalidity of the statute itself. An abuse or disregard of power or authority granted by a statute has never been held to invalidate the statute, whatever may be the remedies which the injured party may have against the person or official so violating its terms.

The 5th Amendment does not relate to the action of individuals. Its restraint is upon Congress, similar to that imposed upon the states under the 14th Amendment. It "is a limitation only upon the powers of the general government".

Talton v. Mayes, 163 U. S. 376, 382; 41 L. Ed. 196-198; 16 S. Ct. 986.

Corrigan v. Buckley, 271 U. S. 323; 70 L. Ed. 969.

Teague v. Brotherhood of Railroad Firemen and Enginemen, 127 Fed. (2d) 53.

National Federation of Railway Workers v. National Mediation Board, 71 App. D. C. 266, 110 Fed. (2d) 529, 537.

National Labor Relations Board v. Washington Virginia and Maryland Coach Company, C. C. A. 1936, 85 Fed. (2d) 990, affirmed 57 S. Ct. 648, 301 U. S. 142, 81 L. Ed. 965.

S. Buchsbaum & Co. v. Beman, D. C. Ill. 1936, 14 F. Supp. 444.

Texas Electric Ry. Co. v. Eustus, D. C. Texas 1938, 25 F. Supp. 825, affirmed, 60 S. Ct. 134, 308 U. S. 512; rehearing denied, 60 S. Ct. 258, 308 U. S. 637, 84 L. Ed. 529.

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 140 Fed. (2d) 35, (in which Petition for Certiorari to this Court is now pending).

The contention that the giving of the notice of March 28, 1940, or the negotiation of the agreement of February 18, 1941, and supplemental agreement of May 12, 1941, may be construed as violating any right or immunity of the petitioner guaranteed under the 13th Amendment is patently frivolous. No such Federal question is shown to have been raised in the trial court or in the Supreme Court of Alabama. The 13th Amendment prohibits "slavery" or "involuntary servitude". Neither of these terms has in any instance been construed as prohibiting "economic servitude"; and it would be difficult to conceive of the effect or the consequences if the terms "economic servitude" were substituted for "involuntary servitude". Petitioner cannot claim that involuntary servitude in any sense is imposed under the Railway Labor Act, for the reason that Section 159, Eighth, Title 45 U. S. C. A., expressly protects petitioner against any possible involuntary service. This provision reads as follows:

> "Eighth. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual

employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

The petitioner misconceives the notice requirement under the Railway Labor Act and under the collective bargaining agreement of March 1, 1929 (Article 43 of the agreement). (R. 168). The notice requirement under the Act provided in Section 156 (Title 45, Sec. 156, U. S. C.) is thirty days' notice to be given by a carrier to the bargaining representative or by the representative to the carrier. The provisions of the agreement of March 1, 1929, follow this statute and were complied with in the notice of March 28, 1940. This construction of the statute is supported in the case of *Illinois Central Railway Company v. Moore*, 112 Fed. (2d) 959-966, reversed on other grounds in *Moore v. Illinois Central Railway Company*, 312 U. S. 630, 61 S. Ct. 754.

III

The alleged unfair action of the Brotherhood as representative of the firemen under the Railway Labor Act does not present a substantial Federal question.

The settlement of all labor disputes involving interstate commerce, including such questions as the designation of crafts and classes, the choosing of bargaining representatives, the agreements thus negotiated, and the construction thereof, is a matter for mediation, conciliation or arbitration under the machinery provided

by the Railway Labor Act, and interference by judicial process has been excluded, with exceptions not here involved.

The case of *Brotherhood v. United Transport Service Employees of America, supra,* on the facts, presented a contention similar to that made by the petitioner in this case. There the Negro "redcaps" complained of action taken by the Brotherhood as representative under the Act, on the ground that the Negro "redcaps" were not permitted membership in the Brotherhood and were therefore entitled to a separate classification in the exercise of their choice of a bargaining representative. This the Mediation Board denied, and, upon application to the District Court, the action of the Mediation Board was set aside. The decision was affirmed by the Court of Appeals for the District of Columbia. After granting certiorari, this Court reversed on the authority of the *Missouri, Kansas and Texas case; supra,* the *Southern Pacific case, supra,* and the case of *Switchmen's Union v. National Mediation Board, supra.*

The rule was followed in the case of *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, No. 702,* now pending before this Court on application for writ of certiorari.

However, any cause of action which might accrue to petitioner, by reason of an alleged wrongful act of the Brotherhood as the representative of his class or craft (which we do not concede to be the case), would not constitute an action arising under the Federal statute, but would constitute an action under State Law.

Teague v. Brotherhood of Locomotive Firemen & Enginemen, supra.

Gully v. First National Bank, supra.

Barnhart v. Western Maryland Ry. Co., C. C. A. Fourth, 128 Fed. (2d) 709.

Burke v. Union Pacific Ry Co., C. C. A. Tenth, 129 Fed. 2d. 844.

Petitioner's attempt to draw an analogy between provisions in the Railway Labor Act for the choosing by the employees of a representative, by majority vote, for collective bargaining purposes, and the provisions of State statutes under which power to control elections has been construed as having been delegated by the State to agencies permitted to prescribe qualifications for voting, contrary to the 15th Amendment, runs far afield of the questions in this case, for these reasons:

a. This Court has decided that these provisions in the Railway Labor Act do not confer governmental power, and therefore do not constitute a grant of power (*Terminal Railroad Association v. Brotherhood of R. Trainmen, supra*).

b. The representative becomes the chosen agent of the employees and not an agency of the Government.

c. The provisions for the determination of the voting unit (craft or class of employees), the supervision of such voting, and the determination of the result by the National Mediation Board, coupled with provisions to enforce compliance with the findings of

the Board; do not violate due process nor infringe any constitutional right.

d. There is no discrimination permitted in the voting within a craft or class.

e. Both the employment and the acceptance of the provisions of the Act by the employee are voluntary.

f. Congress is without power to prevent discrimination by the Railroad in its employment of labor. The 15th Amendment has no application thereto; nor does the discrimination of the individual employer violate due process.

g. The bargaining representative is without power to destroy the individual employer's right to discriminate in its employment of the members of any race, nor is such power vested in Congress.

Cases involving construction of State election statutes permitting discrimination between voters by reason of race, in violation of the 15th Amendment, are clearly inapplicable to any question involved in this case. Discrimination in private employment is not forbidden by the Constitution, but is a right which may not be disassociated from freedom itself. It is not on a parity with discrimination against the exercise of the citizen's right to vote.

IV

Jurisdiction for review by writ of certiorari in this case is lacking for the further reason that the cause

of action sought to be enforced (although improperly plead) is one under State law.

The reasoning underlying the decision of the Supreme Court of Alabama is as follows:

(a) It followed the decisions of this Court to the effect that the Due Process Clause of the 5th Amendment does not apply to the action of individuals (*Corrigan v. Buckley, supra*).

(b) That the bill in effect sought the specific performance of the terms of the original agreement of March 1, 1929, contrary to established rules of equity. (*Hewitt v. Magic City Furniture Co.*, 214 Ala. 265, 107 S. 745, 44 A. L. R. 1441; *Donovan v. Travers*, 285 Mass. 167).

(c) That no Federal question was properly presented (*Teague v. Brotherhood of Locomotive Firemen & Enginemen*, 127 Fed. (2d) 53; *Gully v. First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96).

(d) That the amendatory agreements negotiated by the Brotherhood as representative of the class or craft to which petitioner belonged were pursuant to the procedure prescribed by the Railway Labor Act, and were binding upon the Railroad and upon the petitioner as a member of such craft or class, under the facts alleged in the bill. Such construction appears to be in accord with the decisions of this Court in the cases of *Switchmen's Union v. National Mediation Board, supra*; *Missouri, Kansas & Texas case, supra*, *Southern Pacific case, supra*, although the conclusion

was reached upon different grounds than as expressed in such cases.

(e) That the bill did not contain a sufficient allegation of facts to support any charge of fraud; that fraud is never presumed and is not permitted to be alleged by way of conclusion. (*Winn v. Winn*, 242 Ala. 324, 6 So. (2d) 401; *Birmingham Trust & Savings Co. v. Shelton*, 231 Ala. 62, 163 So. 593; *Broom v. Douglas*, 175 Ala. 268, 57 So. 860, 24 Am Jur. 88.)

(f) The Court held that a proper action would lie by an employee against a third person for an unlawful invasion or interference with the employment contract or seniority rights. (*Shaup v. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *U. S. Fidelity Co. v. Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520).

In the *Shaup case, supra*, the Court held that a bill in equity would not lie to enforce seniority rights. In the *Millonas case supra*, the action for interference with the employment was an action at law for damages, for wrongfully procuring the discharge of the employee. Since the remedy in an action at law for damages is adequate, the bill was clearly without equity. Furthermore, it is the settled rule in Alabama that when equitable jurisdiction is found to be wanting the cause may not be retained merely for the purpose of awarding monetary damages, for the reason that the complainant has therefor an adequate remedy at law. (*Yancey v. Taylor*, 218 Ala. 235, 118 So. 271; 30 C. J. S. 425, Sec. 72, p. 427, Sec. 73.)

CONCLUSION

For the foregoing reasons there does not appear to be any substantial Federal question which would support the jurisdictional requirements for the granting of a writ of certiorari in this case; the petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief and argument was mailed, postage prepaid, to Arthur D. Shores, Masonic Temple Building, Birmingham, Alabama, and Charles H. Houston, 615 F Street, N. W., Washington, D. C., Counsel for Petitioners, on the ..... day of May, 1944.

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